

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE LALONE,

Defendant-Appellant.

UNPUBLISHED

May 5, 2005

No. 251326

Iosco Circuit Court

LC Nos. 00-004110-FC

00-004111-FC

00-004112-FC

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant pleaded guilty in three separate actions to two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age), and one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (victim thirteen to sixteen years of age).¹ Defendant's convictions stem from incidents involving three of his step-grandsons. Defendant repeatedly sexually abused each of the boys, including oral and anal penetration. Defendant was sentenced to concurrent terms of 30 to 50 years' imprisonment for each CSC I conviction and to 10 to 15 years' imprisonment for the CSC III conviction. Defendant's sentences exceeded those recommended under the statutory guidelines. Defendant filed a delayed application for leave to appeal to this Court, which was denied.² Defendant appealed that ruling to the Michigan Supreme Court, which held its decision in abeyance pending decisions in *People v Aliakbar*, 469 Mich 864 (2003) and *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).³ After those decisions were released, the Supreme Court remanded

¹ Defendant's two CSC I convictions came in lower court docket nos. 00-004110-FC and 00-004112-FC. Defendant's CSC III conviction came in lower court docket no. 00-004111-FC.

² *People v LaLone*, unpublished order of the Court of Appeals, entered May 16, 2002 (Docket No. 240515).

³ *People v LaLone*, 655 NW2d 565 (2002) (Table).

the present case to this Court for consideration as on leave granted.⁴ We affirm. This case is being decided without oral argument under MCR 7.214(E).

On appeal, defendant asserts that the trial court exceeded its authority in making an upward departure from the statutory guidelines. We disagree. Under MCL 769.34(3), a trial court may depart from the guidelines for substantial and compelling reasons that are stated on the record. The Michigan Supreme Court has interpreted the terms substantial and compelling to mean that the factors a trial court relies on must be objective and verifiable, of considerable worth in determining the length of the sentence imposed, irresistibly attention grabbing, and must exist only in exceptional cases. *Babcock, supra* at 258-259. Moreover, “[i]n determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Id.* at 262. In other words, in order for a departure to be justified by the identified substantial and compelling reasons, the sentence imposed must be proportionate to the defendant’s conduct and prior criminal history. *Id.* at 262-264. However, the trial court’s reasons for departure may not be based “on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

In this case, the trial court cited multiple reasons for making an upward departure from the guidelines. It is clear from the record that the court was concerned that the guidelines did not adequately address the circumstances of defendant’s crimes, resulting in a score that was not proportionate to the facts of the case. Specifically, the trial court relied on the number of unprosecuted assaults defendant committed, the age of the victims, and the cycle of abuse defendant’s action fostered.

First, the court stated that while the defendant had only been convicted of three crimes because of a plea bargain struck with the prosecutor, it was clear from the record that he had actually assaulted each of the boys repeatedly over a significant period of time. The existence of the dismissed charges is objective and verifiable from the record, and while it is not exceptional that dismissed charges exist, the number and similarity of the additional incidents of sexual abuse not accounted for in the convictions does “‘keenly’ or ‘irresistibly’ grab” ones attention. *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995), quoting *Webster’s New World Dictionary, Third College Edition*. See *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001) (observing that “the prosecutor’s decision, in exchange for defendant’s guilty plea, to dismiss a charge of first-degree CSC . . . and the fact that defendant was not charged with attempted CSC . . . are additional factors that the court can consider when deciding whether departure is warranted”).

Further, this justification for departure was not already adequately considered in the guidelines. MCL 769.34(3)(b); *Babcock, supra* at 258 n 12. Offense variable (OV) 13 (continuing pattern of criminal behavior) provides that if the sentencing “offense was part of a

⁴ *People v LaLone*, 469 Mich 917; 673 NW2d 104 (2003).

pattern of felonious criminal activity involving 3 or more crimes against a person,” twenty-five points should be scored. MCL 777.43(1)(b). Defendant was scored twenty-five points on each of his convictions for this variable. MCL 777.43(2)(a) states that in determining the number of points under this variable “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” Therefore, OV 13 addressed all of defendant’s crimes against the children that did not result in convictions because these additional incidents fall within the cumulative category, “3 or more.” However, while OV 13 provides for a defendant who committed “3 or more” other crimes, it does not adequately distinguish between those situations where the number of additional crimes is closer to three and those where the number is quite large. Here, the court noted that the victims each described “a dozen or more” incidents of sexual abuse. The category “3 or more” does not adequately account for such a large number of incidents of sexual abuse.

Second, the court noted that the victims were only eight, nine, and twelve years of age. The age of the victims is objective and verifiable and is a factor of considerable worth in determining an appropriate sentence. The trial judge specifically noted on the record that he believed the guidelines only tangentially take into consideration a victim’s age under OV 10 (exploitation of a victim’s vulnerability). MCL 777.40(1)(b). While it is true that age is also a factor in determining the degree of the offense, here, first-degree (victim under thirteen) and third-degree (victim thirteen to sixteen), the sentencing guidelines do not allow for adding points to a defendant’s sentencing score depending on the victim’s age. Thus, under the guidelines, there is no difference in scoring whether the victim is twelve or five, despite the fact that that significant age difference may reflect on the reprehensibility of the crime. *People v Reincke*, 261 Mich App 264, 270; 680 NW2d 923 (2004) (three year old child’s vulnerability not adequately considered). Therefore, the age of the victims is an objective and verifiable factor not adequately considered in the guidelines.

Third, the trial judge cited the cycle of predation defendant continued as a factor not adequately considered in the guidelines. We need not address the evidentiary support for this finding, other than to say that under the circumstances of this case, this objective and verifiable factor grabs one’s attention and is not adequately considered in the legislative guidelines.

Defendant also argues that the trial court impermissibly based its decision on a conclusory diagnosis that he is a pedophile and thus a future threat to the community. However, community protection is always a goal of sentencing, *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), and in departing from the guidelines here, the trial court actually relied on defendant’s conduct and history, factors which underlie its concern for other children. Moreover, in referring to defendant as a pedophile, we do not believe the court was attempting to make a medical diagnosis. Rather, the court was using the term as it is used in common parlance – as a communicative label for an adult who has a sexual attraction to young children – to summarize its observations about defendant’s behavior. That behavior includes repeatedly sexually abusing his young victims, a previous conviction for attempted fourth-degree criminal sexual conduct (CSC IV), and the nature of the assaults in this case, assaults that included oral and anal penetration. Thus, it is defendant’s history that the court relied on in determining that a departure was warranted, not the labeling of defendant as a pedophile. See *People v Geno*, 261 Mich App 624, 636; 683 NW2d 687 (2004); *Reincke*, *supra* at 271; *People v Solmonson*, 261 Mich App 657, 670-671; 683 NW2d 761 (2004).

Finally, we conclude that the sentence imposed is proportionate to defendant's conduct and record, and, accordingly, more proportionate than a sentence within the guidelines would have been. *Babcock, supra* at 264. The sentence imposed on defendant for the CSC I convictions is twice the minimum range the guidelines recommended, and the sentence imposed for the CSC III conviction also significantly exceeded the recommended minimum sentence range. Defendant admitted that he was unable to control his pedophilic thoughts, and that he had repeatedly abused his young step-grandsons, not realizing that what he was doing was wrong. To achieve a proportionate sentence, the trial court reasonably concluded that defendant's depraved behavior requires a significant departure from the guidelines. The terms imposed are not beyond the range of principled outcomes in this case. *Babcock, supra* at 267-270.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder